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Decision

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 BECK CHEVROLET CO., INC.,

4 Plaintiff, New York, N.Y.

5 v. 11 Civ. 2856 (AKH)

6 GENERAL MOTORS, LLC,

7 Defendant.  
-----x

9 September 24, 2013  
10:40 a.m.

10 Before:

11 HON. ALVIN K. HELLERSTEIN,

12 District Judge

13 APPEARANCES

14 ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK P.C.

15 Attorneys for Plaintiff

16 BY: RUSSELL P. McRORY

17 JOHN D. D'ERCOLE

18 BINGHAM McCUTCHEN LLP

19 Attorneys for Defendant

BY: JAMES C. MCGRATH

TREVOR C. WILMOT

-and-

D'Arcy Thomson, Paralegal

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1 (Trial resumed)

2 THE COURT: Good morning, everyone. Please be seated.

3 ALL COUNSEL: Good morning, your Honor.

4 THE COURT: I just need a few minutes.

5 (Pause)

6 What follows are my findings of fact and conclusions  
7 of law following a bench trial conducted on September 16, 17,  
8 18 and 23, 2013.

9 There is a narrow issue that's tendered -- whether  
10 under Section 469(2)(1) of the New York Vehicle and Traffic Law  
11 and Section 463(2)(gg) of that law General Motors has been  
12 using an unreasonable, arbitrary or unfair sales or other  
13 performance standard in determining a franchise motor vehicle  
14 dealer's compliance with a franchise agreement. That is the  
15 only issue left before me in this case.

16 As will appear from my findings of fact and  
17 conclusions of law, I hold that the methodology used by General  
18 Motors is not unreasonable, arbitrary or unfair in measuring  
19 sales performance by Beck Chevrolet Co., Inc.

20 The parties in the Pretrial Order have defined this  
21 issue and raised various preliminary issues, which I believe  
22 have been the subject of previous rulings, but to make things  
23 clear and to make it clear that I am incorporating those  
24 previous rulings into this decision, I will make the following  
25 rulings now.

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1               First, I have jurisdiction over the parties; there is  
2 no issue on that. And I have subject matter jurisdiction; Beck  
3 does raise an issue with respect to that.

4               This case was originally begun in the Supreme Court of  
5 New York State, County of Westchester. General Motors timely  
6 removed the case to this court on the ground of diversity of  
7 citizenship, which is not contested, and which I find.

8               During the course of pretrial proceedings, I dismissed  
9 the damage elements of the claim as premature and academic, and  
10 Beck urged after those rulings that there no longer was a  
11 requisite threshold of \$75,000, exclusive of interest and  
12 costs. However, the threshold of subject matter jurisdiction  
13 is determined at the time the case is removed, and,  
14 unquestionably, there was that much of threshold jurisdiction,  
15 and more, in the damage claims of Beck. For that holding, see  
16 Powerex Corp. v Reliant Energy Services, Inc., 551 U.S. 224,  
17 decided 2007, and Price v. J&H Marsh & McLennan, Inc., 493 F.3d  
18 55 (2d Cir. 2007). In addition, there clearly is at least that  
19 much value in determining the measure of performance by Beck,  
20 for if Beck does not comply with its requirements in the  
21 operative agreements with General Motors and for that reason  
22 loses its franchise, the value is considerably more than  
23 \$75,000.

24               Thus, I hold that there is subject matter jurisdiction  
25 under 28 U.S.C. Section 1332(a)(1), and the Court is properly

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1 seized with subject matter jurisdiction of this case.

2 Beck also argues that there is no case or controversy,  
3 another aspect of subject matter jurisdiction, because it has  
4 not been terminated and because the issue of termination will  
5 be one for an administrative board under New York State Vehicle  
6 and Traffic Law. However, the dispute has been tendered to me.

7 Beck has argued, and I accept the argument, that under  
8 the operative law of the Vehicle and Traffic Law, particularly  
9 Section 469(2)(1), Beck has the right to bring suit. That  
10 provision provides that a franchised motor vehicle dealer who  
11 is or may be aggrieved by a violation of this article shall be  
12 entitled to sue for and have injunctive relief and damages in  
13 any court of the state having jurisdiction over the parties.  
14 In any such judicial action, the court may award necessary  
15 costs and disbursements plus a reasonable attorney's fee to any  
16 party.

17 Beck feels aggrieved by being measured for its  
18 compliance with indices based on statewide jurisdiction, by  
19 statewide sales calculations and averaging, and brings its  
20 lawsuit under that section of the law. Hence, there is a real  
21 case and controversy, I so hold, and I deny Beck's arguments  
22 with respect to these threshold matters.

23 The parties have also set out as agreed statements of  
24 facts, which I appreciate very much, and let me put these into  
25 the record:

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1                   Beck Chevrolet Co., Inc., the plaintiff, is a New York  
2 corporation with its principal place of business in Yonkers,  
3 New York.

4                   Beck has operated a Chevrolet dealership in Yonkers,  
5 New York, on Central Avenue, close to the New York State  
6 Throughway since 1977. It has been operating under various  
7 dealer sales and service agreements with General Motors  
8 Corporation and, since General Motors emerged from bankruptcy  
9 with the defendant, General Motors LLC.

10                  General Motors LLC is a limited liability company  
11 organized under the laws of the State of Delaware, with a  
12 principal place of business in the State of Michigan. Its only  
13 partner is also an LLC, and its sole member is General Motors  
14 Company. And each of the defendant entities was organized and  
15 exists under the laws of the State of Delaware and maintains a  
16 principal place of business in the State of Michigan.

17                  Hence, I have looked through the LLC for its  
18 constituent members, and I find that there is complete  
19 diversity of citizenship between the plaintiff and the  
20 defendant, looking through the defendant until one finds a  
21 jural entity which satisfies the diversity requirement.

22                  General Motors manufactures and distributes new motor  
23 vehicles and related products in the United States through a  
24 network of authorized franchised dealers.

25                  And I'm continuing to read from the agreed statements

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1 of fact.

2 In June 2009, the former entity, General Motors  
3 Corporation, which I'll called "Old GM," sought bankruptcy  
4 protection. Old GM eventually sold substantially all of its  
5 assets to General Motors LLC, the defendant in this lawsuit.  
6 Prior to the sale, Old GM undertook a process in bankruptcy to  
7 consolidate its dealer network. As part of this consolidation  
8 process, Old GM offered certain dealers participation  
9 agreements to continue their franchises and offered other  
10 dealers wind down agreements to terminate their franchise  
11 relationship in exchange for cash payments.

12 As part of this process within bankruptcy, Beck  
13 executed a Wind-Down Agreement to discontinue its operations by  
14 October 2010, in exchange for an agreed cash payment of  
15 approximately \$390,000. After this process was complete, Old  
16 GM sold substantially all its assets to new GM, including an  
17 assignment of all participation and wind-down agreements.

18 Beck then approached GM to reconsider its wind-down  
19 decision, and in September 2009 GM agreed to offer Beck a  
20 Participation Agreement, and Beck executed that Agreement on  
21 September 9, 2009.

22 A bit later I will discuss in more detail some of the  
23 agreements and understandings made by Beck in connection with  
24 that Participation Agreement, but for the moment let me  
25 continue reading the agreed statements of facts.

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Under these participation agreements, GM measures its dealers' sales performance by a measure called Retail Sales Index, or "RSI." RSI is a numerical index calculated by dividing a dealer's actual retail sales anywhere in the United States according to segments. Each segment reflects a different type of motor vehicle. For example, a compact sedan is one segment. A pick-up vehicle is another segment. An SUV is another segment. And there are many such segments in which various manufacturers' makes compete.

To obtain the RSI, the automobile dealers and manufacturers take a state average market share in the dealer's market area, which is called an Area of Geographic Sales and Service Advantage, or "AGSSA," and then multiply the resulting figure by 100. To express it in a fraction how this is derived -- and I'll ask counsel to comment immediately if I have it wrong -- a fraction is taken of all the Chevrolet sales in a particular state -- here in New York State -- by segment; that becomes the numerator. The denominator are total vehicle sales of all makes of vehicle in New York State also by segment. And each segment is then expressed in a percentage. That percentage, which I'll call "X," is then multiplied by the total vehicles of all makes registered in a dealer's AGSSA, and that percentage then becomes the quota for that dealer.

Another fraction is taken, the numerator of which are all sales of vehicles of all segments by the dealer anywhere in

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1 the United States over the percentage of total vehicles of all  
2 makes registered in an AGSSA, and that becomes the performance  
3 of the dealer in relation to the quota.

4 Do I have it right, Mr. McRory?

5 (Pause)

6 MR. MCRORY: Your Honor, I'm not sure we've expressed  
7 it in that way, but I think you have the gist of it.

8 THE COURT: Mr. McGrath?

9 MR. MCGRATH: I agree. I don't think we've expressed  
10 it exactly in that way.

11 THE COURT: I've done it this way because I think it  
12 expresses it in terms of an arithmetical function that is  
13 clear. I have had trouble trying to figure it out from the  
14 testimony and the like. We could illustrate it by an exhibit,  
15 but I think unless there is objection I would like to go by  
16 this standard.

17 MR. MCGRATH: That is fine, your Honor.

18 MR. MCRORY: That is fine.

19 MR. MCGRATH: I think the exhibits will support that.

20 THE COURT: Thank you, both.

21 I will continue with the agreed facts.

22 Since at least 1999, General Motors has measured its  
23 Chevrolet dealers' RSI using Chevrolet's state average market  
24 share in each dealer's assigned market area -- that is the  
25 AGSSA -- adjusted for segment popularity.

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1                 Now, let me take a word on this adjustment because it  
2 figured in a good deal of the testimony and is also a concept  
3 that is a little bit elusive.

4                 I said before that the fractions that I used to  
5 express the index measures all vehicle sales of all segments.  
6 In that way, by measuring all a dealer's sales, General Motors  
7 believes -- and I find -- that the RSI adjusts for different  
8 popularity of vehicles and different biases of consumers under  
9 normal business circumstances.

10               For example, if in a particular AGSSA consumers like  
11 pick-up trucks, more of those pick-up trucks may be sold  
12 relative to sedans, while in another AGSSA the reverse might be  
13 true. By taking the arithmetical function in relationship to  
14 all vehicle sales, each sale becomes the same as a sale of any  
15 other vehicle, and in that fashion there is an adjustment. The  
16 intent of the RSI is to measure a dealer's total performance,  
17 and it doesn't make a difference in that measurement what  
18 segments are performed to good number and what performed to  
19 lesser numbers, as long as the total of sales measures up to  
20 the index.

21               Beck takes exception to the adequacy of that overall  
22 index and General Motors defends it. There is a question as to  
23 the adequacy of the adjustment feature of the segment -- it's  
24 called segmented adjustments -- to take in all different  
25 variables, and there was testimony that in some areas where

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1 there is a GM office or a GM manufacturing plant, there is,  
2 because of discounts and other preferences, such an overload of  
3 preference for a particular type of vehicle of some  
4 manufacturer or other, that additional allowances have to be  
5 made. And I think there is in that way an implied admission  
6 that the segment adjustments are not adequate to cover that  
7 relationship. But short of that, General Motors adamantly  
8 expresses the view that the segments adjust for different kinds  
9 of consumer biases, while Beck disagrees.

10 I find that the segments expressed an adequate  
11 adjustment for business transactions and/or business  
12 measurements, and I therefore rule in favor of General Motors  
13 on that particular point.

14 In any event, since at least -- these are two more of  
15 the last agreed facts. Since at least 1999, General Motors has  
16 measured its Chevrolet dealers' RSI using Chevrolet state  
17 average market share in each dealer's assigned market area,  
18 adjusted for segment popularity. Accordingly, since at least  
19 1999, GM has measured Beck's RSI using Chevrolet's New York  
20 State average market share in Beck's AGSSA, adjusted for  
21 segment popularity.

22 Next I'm going to discuss the Participation Agreement.  
23 Beck operates a Chevrolet dealership in Yonkers  
24 pursuant to a series of agreements, called the Dealer  
25 Agreements, with the manufacturer of Chevrolet automobiles, the

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1 defendant, General Motors LLC, and its predecessor companies.

2 The dealer agreements incorporate certain standard  
3 provisions pursuant to which all Chevrolet car dealerships  
4 agree that they will be evaluated by a Retail Sales Index (the  
5 "RSI"), and they agree further that their goal is to achieve an  
6 RSI equal to or greater than 100. The standard provisions  
7 provide also that, "If dealer's Retail Sales Index is less than  
8 100, dealer's sales performance will be rated as provided in  
9 the General Motors sales evaluation process." That's Article 9  
10 of the standard provisions.

11 "Further, that when deciding whether to begin the  
12 process for terminating a dealer, GM will consider not only the  
13 RSI but, 'any other relevant factors.'"

14 That's all Article 9.

15 I mentioned before from the agreed statement of facts  
16 the wind-down agreements. Through this process, GM reduced the  
17 number of Chevrolet dealers nationally and in the New York City  
18 metropolitan area. Of that area, the Downstate area,  
19 stretching from Westchester County, including all of New York  
20 City, the five counties in New York City, and Westchester and  
21 Suffolk Counties -- those are nine counties -- there used to be  
22 nine dealers. Now there are five. Four of those dealers were  
23 terminated as part of the bankruptcy.

24 I mentioned before that Beck originally also was to  
25 have been terminated -- it had accepted a Wind-Down

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1 Agreement -- but it persuaded General Motors to let it enter  
2 into a Participation Agreement in lieu of the Wind-Down  
3 Agreement, and General Motors agreed to do that. In the  
4 context, there was specific discussion between representatives  
5 of General Motors and the Gellers -- the principals of Beck --  
6 concerning how Beck's performance would be measured. There was  
7 explanation made by General Motors' representatives that  
8 explained how the RSI was derived and how Beck would be  
9 expected to work its way up to perform to satisfy the RSI, that  
10 is, improve its performance from the 30s, that had existed  
11 before and during the bankruptcy, to reach 100, and it was to  
12 be accomplished in stages, which I'll mention in just a moment.

13 The point I want to stress here is that the Gellers  
14 expressed their understanding of this performance and their  
15 desire to satisfy it, indicating their acceptance of the  
16 standard, their understanding of the standard, and they  
17 expressly commented that although they considered that their  
18 relatively weaker performance in the past was based on improper  
19 gauges of performance, they ultimately conceded that there was  
20 nothing unfair in using average sales indices of sales across  
21 the state to measure the Beck performance.

22 The Participation Agreement between Beck and General  
23 Motors contained a series of performance requirements,  
24 including a sales requirement that Beck achieve an RSI of at  
25 least 70 in 2010, 85 in 2011, and 100 in 2012. Specifically,

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1 Section 9(a) of the Participation Agreement provided:

2 "Performance standard shall mean dealer's Aggregate Retail  
3 Sales Index (or "RSI") for the existing model line in dealer's  
4 Year-End Retail Sales Performance Report prepared by GM, shall  
5 be equal to or greater than:

6 "1. 70 for the calendar year 2010.

7 "2. 85 for the calendar year 2011; and

8 "3. 100 for the calendar year 2012.

9 "Further, dealer's failure to achieve the RSI required  
10 in the previous sentence for any of the calendar years  
11 identified shall constitute a default under the terms of this  
12 letter agreement."

13 Section 9(a) of the Participation Agreement also  
14 defined how RSI should be calculated. The provision stated  
15 that it was to be determined by dividing the sum of the total  
16 of dealer's reported retail sales by unit for the existing  
17 model line as set forth on the Retail Sales Performance Review  
18 Report prepared by General Motors for each applicable calendar  
19 year. And this total of the dealer's reported retail sales was  
20 then to be divided by the total of the sales by the units that  
21 dealer needs to equal the State of New York average, segment  
22 adjusted, for the existing model line, as set forth on the  
23 Retail Sales Performance Review Report prepared by GM for the  
24 applicable calendar year.

25 This Retail Sales Performance Review Report was the

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1 subject of discussion at least at the time that Beck signed the  
2 Participation Agreement, and it was part of the understanding  
3 given to Beck how the RSI was to be calculated, how Beck was  
4 expected to live by it, and it led to the expression of  
5 understanding by the elder Geller of this report in his  
6 statement that he did not consider it unfair.

7 When a dealer's total sales anywhere equal the  
8 expected sales, the dealer's score, using the RSI index, is  
9 100. 100 is not a perfect score; it is an average score. It  
10 reflects the average of sales by dealers throughout New York  
11 State.

12 GM uses the dealer's score to evaluate the performance  
13 of the dealers, ranking them in five categories, as follows:

14 A score of "superior" is the characterization given  
15 when the dealer achieves 100 or better, provided that the  
16 dealer is then in the top 15 percent in sales of all dealers in  
17 the state.

18 A characterization of "satisfactory" is for dealers  
19 who achieve 100 or more but are not in the top 15 percent of  
20 the dealers.

21 A dealer who scores 85 to 99 is given a  
22 characterization "needs improvement."

23 A dealer whose score is less than 85, but not in the  
24 bottom 15 percent of dealers, is given a characterization of  
25 "needs significant improvement."

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1           A dealer whose score is below 85, and has a  
2 performance which places him in the bottom 15 percent of  
3 dealers in the state, is given a rating of "unsatisfactory."

4           GM communicates these ratings to its Chevrolet dealers  
5 and uses them as a exhortatory tool to get these dealers to  
6 improve sales.

7           With regard to dealers not rated as superior or  
8 satisfactory, and sometimes even with these dealers, GM has  
9 programs, including one called the Dealer Performance Process,  
10 designed to improve dealers' sales by offering assistance and  
11 advice. Although these programs focus on dealers who are  
12 ranked unsatisfactory, or dealers needing significant  
13 improvement, the consultation is available to other dealers as  
14 well.

15           Generally, according to GM's testimony, it will not  
16 seek to terminate a dealer simply because the dealer did not  
17 achieve an RSI of 100. GM prefers to work with the dealers to  
18 get them to improve their performance, reserving termination  
19 for dealers who are not able to improve their performance.

20           Before terminating a dealer, GM will consider not only  
21 the dealer's RSI but also other mitigating factors which might  
22 explain failures to meet the sales targets. These, for  
23 example, could be major activity within the AGSSA that tie up  
24 roads or make it difficult for people to get to the dealer, or  
25 other kinds of considerations which might explain a dealer's

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1 relatively weaker performance in a particular year.

2 The issue in this case raises the question whether it  
3 is arbitrary for GM to average sales for the AGSSAs in the  
4 Downstate market with total sales that average across New York  
5 State.

6 Beck argues that the Downstate market is unique  
7 because of the popularity of imports, the concentration of  
8 populations, the number of dealers, and other such factors.  
9 Beck insists that its performance should be compared and rated  
10 not against statewide averages, which place too much effect to  
11 Upstate dealers' performances, but only to like dealers in the  
12 Downstate market. Beck argues that significantly more Upstate  
13 dealers are able to achieve RSIs of 100 than are the Downstate  
14 dealers. Beck argues that in the Downstate area only four  
15 dealers out of 23 achieved a score of 100. Of those four,  
16 three were in Suffolk County, the Downstate county, where there  
17 is greatest resemblance to many Upstate counties.

18 Chevrolet and General Motors argues that using  
19 mediocrity as a performance index dooms the entire make of  
20 Chevrolet vehicles to mediocrity. Unless steps are taken to  
21 raise the performance levels of the mediocre dealers that Beck  
22 is talking about, Chevrolet will give up its metropolitan  
23 markets to import vehicles and those of other makes, and the  
24 very process that gave rise to General Motors' bankruptcy will  
25 be repeated.

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1           So the issue really is whether it is appropriate,  
2 whether it is reasonable, whether it is fair, whether it is not  
3 arbitrary to use a statewide standard.

4           A standard to be a standard must be objective. It  
5 cannot give rise to unique arguments of exceptions if the  
6 standard is to be generally applicable and not arbitrary as to  
7 particular dealers. It has to be made to fit all sizes in all  
8 categories that can be said or reasonably be said to be within  
9 a local market.

10          General Motors points out that all manufacturers use a  
11 standard that is state-wide or greater. Indeed, General Motors  
12 used to use national markets as an index and regional markets  
13 that overlap many different states, but it went down to the  
14 state markets because many of the dealers complained that they  
15 were being measured by too great a geographical area and too  
16 great a set of dissimilarities.

17          In choosing states as the index of measurement,  
18 General Motors used an administratively convenient index.  
19 States, since the birth of our nation, have been the  
20 territorial demarcation of administrative and governing areas.  
21 States are an entity of government. State taxation and state  
22 policies cross a state area. Using a state's statistical  
23 information is known in many different fields of operation and  
24 is understandably appropriated by nationwide and international  
25 manufacturers to measure performance.

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1           Beck points out that General Motors does not use a  
2 state standard to measure its own manufacturing performance,  
3 but that is irrelevant, how General Motors evaluates itself.  
4 Where it is based on state operations and dealer operations  
5 within the states and laws that are passed by particular states  
6 and taxations and various kinds of economic regulatory measures  
7 used by particular states, the states become a measure of  
8 convenience, and using a state standard enables General Motors  
9 to be evenhanded with respect to all its dealers and measure  
10 them against the state performance.

11           The segmented nature of the calculations allows for  
12 adjustments as to popularity within brands, and General Motors  
13 uses other indices to check the reasonableness of its  
14 performances, comparing, for example, a local dealer like Beck  
15 to local dealers selling Fords and local dealers selling  
16 Chryslers, and ascertains from those standards that a weak  
17 performer, like Beck, compares poorly against the greater sales  
18 performance of the Ford dealer and the Chrysler dealer. If  
19 imports are, as Beck argues, a major impediment to measuring  
20 its performance, that should be true equally to the Ford dealer  
21 and the Chrysler dealer, but General Motors shows statistically  
22 that that is not so and it is outperformed by Ford and Chrysler  
23 in its AGSSA.

24           Another check is to use Beck's performance against  
25 neighboring dealers, and those statistics show that at least

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1 one of them sells more cars, more vehicles, in Beck's AGSSA  
2 than Beck does itself. The dealer to the north, Curry,  
3 operating in Scarsdale, sells more cars, more vehicles, in the  
4 Beck AGSSA of Yonkers and surrounding areas than does Beck, and  
5 that also is an index that can be used to confirm the  
6 reasonableness of using statewide standards.

7 Beck argues for other indices where it would come out  
8 with a much better score. Its score in statewide standards is  
9 between 50 and 51 percent -- not much movement from year to  
10 year, counting 2010, 2011 and 2012. And it points out that  
11 using different standards, its scores go up into the 80s and  
12 even into the 90s, and Beck argues that there could be a  
13 comparison against what is called the New York Zone. The New  
14 York Zone extends into Connecticut and as far as the Poconos  
15 Mountains, taking in counties like Delaware County in New  
16 Jersey, the Pocono Mountains, which are sparsely populated, and  
17 taking into consideration areas in the western fringe of  
18 Connecticut that are probably the most affluent in the United  
19 States, thus comprising as dissimilar an area as the area it  
20 complains about.

21 Beck also argues to score it against a Downstate  
22 population, Downstate dealers in the area of the nine counties  
23 that we are talking about, Westchester coming down south and  
24 east into Long Island, but those areas also are dissimilar.  
25 Beck is outperformed by many others, and its score of 85 to 90

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1       in an area that it has jerrymandered to be its indicated area  
2       shows that it's not performing as well as the average, because  
3       it's under 100, and would force General Motors to take an index  
4       of sales expectations that's nothing better than mediocre. If  
5       the Downstate area is mediocre and General Motors adopts a  
6       standard that is mediocre, it is downgrading its quotas for all  
7       dealers and would be forced to create a policy that would risk  
8       another entry into bankruptcy.

9                     Beck's expert, Joseph F. Roesner, of the Fontana  
10          Group, testified that the disparity between Chevrolet's sales  
11          performance Downstate and its performance Upstate is  
12          attributable, in part, to Downstate consumers' preference for  
13          imported cars. GM's witnesses testified that this supposed  
14          consumer preference is already adjusted by the use of  
15          segmentation in calculating RSI. These imported vehicles  
16          comprise some segments but not the totality of segments, and  
17          they don't express an overall preference or overall bias for  
18          all segments. The adjustments allow Beck to sell more of other  
19          vehicles in non-import-influenced areas. In any event, as the  
20          experts pointed out, this supposed disparity reflects  
21          aggressive tactics by imports to take over markets from  
22          Chevrolet and other domestic vehicles that the slowness and  
23          laxity of American manufacturers and dealers allowed General  
24          Motors to lose.

25                     This surrender of markets need not be inevitable. A

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proper sales quota will require American dealers to be aggressive in resisting this supposed bias towards imports and take back markets. And to indicate that that can be done, the more effective sales performances by Ford was shown by the experts in the very same area, in the very same AGSSA, as Beck. So if Ford can perform and get a much better score in an RSI calculation, why can't Beck? That's a question that suggests that there is an adequate adjustment and that there is no unreasonableness or arbitrariness or unfairness in expecting Beck to improve its standards up to state average.

The fact that all automobile manufacturers in the United States evaluate their dealers using measures similar to statewide RSIs in even more dispersed geographical areas is an indication of the reasonableness in using state average. The fact that it's administratively convenient and objective and gives rise to undisputable information, equally applicable to every dealer, is a point in favor of its reasonableness. The fact that General Motors uses it to cause dealers selling below state average to improve their performance and checks reasonableness against other kinds of standards is another point in favor of the reasonableness of statewide measurement.

And the fact that it identifies dealers who have missed opportunities to increase their sales against competition, intra-brand competition, for example, typifying the great improvement of a Chevrolet dealer named Major in Long

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1 Island City, is another indication of fairness. The fact that  
2 sales within AGSSA are reflected in substantial selling by  
3 Beck's competitors much more so than Beck is able to show in  
4 other areas is another indication of fairness. And the fact  
5 that Beck has not been able to improve its RSI year to year --  
6 scoring 50.1 in 2010, 50.9 in 2011, and 50.6 in 2012 -- is an  
7 indication of fairness.

8 One would think that if the measure is used, Beck  
9 would take steps to increase its sales, because it can use  
10 sales anywhere in the country against the portions in its  
11 AGSSA. Surely there is opportunity elsewhere. If Major can  
12 find it, such opportunity, if Curry can find such opportunity,  
13 if the Suffolk dealers can find such opportunity, so can Beck,  
14 or at least it's reasonable for General Motors to expect that  
15 of Beck.

16 Just to illustrate, with the sales performance of  
17 Major, it had an RSI of 47.2 in 2011 -- worse than Beck. It  
18 had an RSI of 54.5 in 2011 -- slightly better than Beck. Its  
19 RSI in 2012 was 124.8, showing what can happen if there's  
20 concerted effort to improve.

21 Beck's sales ineffectiveness is shown also relevant to  
22 others, indicating also the reasonableness of the state  
23 standards. It sells fewer vehicles than other domestic dealers  
24 located within a few miles. Beck sold 335 vehicles in 2012.  
25 The local Ford dealer sold 1,205 vehicles. The local Chrysler

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1 dealer sold 1,579 vehicles. And the local Ford and Chrysler  
2 dealers achieved RSIs that are again 100.

3 Now, one must express a reservation about comparisons  
4 based on inadequate statistical development, but it was open to  
5 Beck to challenge the statistical information. One would think  
6 that there is a comparability between the product line of GM  
7 and the product line of Ford. The product line of Chrysler  
8 might be different, but the comparative score of Beck's  
9 50 percent RSI, and better than 100 RSIs at Ford and Chrysler  
10 in the same area, indicate there is something wrong with Beck's  
11 performance and supports the findings used by state average.

12 Beck is the only Chevrolet dealer in the Yonkers area.  
13 In 2012 it sold only 27.3 percent of the Chevrolets registered  
14 in its AGSSA. Curry, the Chevrolet dealer in Scarsdale, sold  
15 33.5 percent of the Chevrolets registered in the Yonkers area.  
16 Now, Curry is also on Central Avenue, probably ten miles to the  
17 north, on the same roads, where consumers can travel northward  
18 as easily as southward. The fact that Curry sells more  
19 vehicles in Beck's AGSSA suggests also that the standards used  
20 by Chevrolet to measure Beck's relative performance are  
21 reasonable.

22 Beck argues that just because the terms are in the  
23 statute of unreasonable, arbitrary or unfair does not mean that  
24 they are bound by those terms because the statute, Section  
25 463(2)(gg) of New York Vehicle and Traffic Law, states that

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"notwithstanding the terms of any franchise contract." So Beck argues that the existence of these terms, to which it agreed, does not bind it and it is right in that respect. But I have to examine these terms in relationship to community standards and business standards of unreasonable, arbitrary and unfair, and I find that the average statewide measurements used by Chevrolet are not unreasonable, arbitrary or unfair. They are administratively convenient. They are objective. They don't give rise to arguments. They don't require a manufacturer and dealer to agree to a standard of measurement which adds many subjective elements. They are uniformly applied. They are easily understood. They give rise to adjustments within the formula. They are compared to other standards that all come out with the same kind of conclusion. They are the subject of efforts of improvement on the part of manufacturer and dealer. So whatever argument can be made by Beck that something is unreasonable or arbitrary or unfair is more than met by the various ways that the standard is set and administered by Chevrolet.

Beck argues on the basis of a number of cases which it cites for the proposition that comparing Downstate and Upstate dealers is inherently unfair, and it focuses on two cases, which I'll mention. North Shore, Inc. v. General Motors Corp., an administrative decision in 2003, is one decision that Beck relies on.

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In that case there were a number of dealers in an area. Under Illinois law, General Motors, in order to bring in another dealer in the area, had to show cause. In other words, the existing dealers were allowed to protest administratively the right of a manufacturer to establish another dealer in the community. The administrative board stated as follows. This is at page 6 of the decision:

"The Franchise Act is remedial in purpose, reflecting the need to preserve and protect the substantial investments of local automobile dealers."

And that sentiment exists in the New York law as well.

"Consistently, the Act places the burden of proving good cause to add a local franchise on the manufacturer."

There is no comparable provision in the New York law.

"Moreover, the Act specifically requires that good cause be shown to support the manufacturer's desire for further market penetration."

There is no such requirement in New York law.

After a long analysis, the administrative board in Illinois ruled that General Motors --

That wasn't General Motors, it was a Nissan dealer wanting to -- I'm sorry, it is General Motors. I'm confusing two cases. It was General Motors.

-- cannot do so, but it said that the circumstances of the case before it was unique. This discussion is at page 90

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1 of the board opinion.

2 First and foremost, the experts' analysis seems  
3 inappropriate to this multiple-dealer network. These are very  
4 crowded and very well-represented markets. In addition, the  
5 issue of product shortfall is a barrier that the experts and GM  
6 cannot overcome.

7 What was shown in that case is that one of the reasons  
8 for relatively weaker performance by the municipal markets, and  
9 dealers in the municipal markets, was because they were not  
10 being given enough of a particular vehicle, and because they  
11 felt that they could sell those vehicles -- here they were  
12 SUVs -- but were not given product, the segmentation adjustment  
13 didn't work, and the board agreed to that. They said -- the  
14 board said we do not mean that GM's analysis was flatout always  
15 inappropriate but, the board held, it was inappropriate in the  
16 unique circumstances of the case before it.

17 At page 91 some additional reasons are given:

18 There are already three General Motors dealers within  
19 a radius of less than ten miles of the new one and there are  
20 seven dealers within eleven miles. Thus, this area is  
21 substantially represented by General Motors at this time.

22 That was one reason.

23 Second, there is little, if any, projected growth  
24 around that dealership.

25 Third, there is insufficient evidence that the dealers

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1 surrounding the new one were underperforming, and there was no  
2 evidence that the answer to any perceived underperformance was  
3 to add a dealer.

4 There is competent evidence, the board held, that  
5 dealers surrounding Jacobs suffer from a lack of product  
6 allocation and adding a new dealer will only exacerbate that  
7 problem.

8 The board held that the public is not served by a  
9 dealer network where the individual dealers are small and lack  
10 adequate product on their lots. The benefit of being a mile or  
11 two closer to the nearest GMC dealer is incremental, at best.  
12 Given that already scarce inventory levels will be stretched  
13 further, the public will not be served by this expansion of the  
14 dealer network into an area where there are already seven  
15 dealers.

16 In many respects we are dealing with the converse of  
17 this situation, and this makes this particular precedent an  
18 ill-fitting one for this case. We are not dealing with  
19 shortages of product. We are not dealing with a need by the  
20 manufacturer to show cause for putting in a dealer. Indeed,  
21 the manufacturer feels that there are too many dealers and has  
22 an incentive to reduce the number of dealers and to work on  
23 dealerships that are larger, have more money to spend, and are  
24 more effective competitors.

25 Beck points out this case was affirmed, but the issue

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of affirmance by the Illinois Supreme Court was only on the issue whether attorney's fees could be shifted, and the Court held that it could not be. I found nothing in the Supreme Court decision that spoke to the issue of this case.

There were indications in the opinion by the administrative board that the board thought it was not appropriate to compare Upstate and Downstate areas, and it's this argument that Beck uses. I disagree with the administrative board. I disagree that there is an applicability of the statute of Illinois with the current statute in New York.

The second opinion that Beck relied on was a decision by my colleague Lewis Kaplan in the case Bronx Auto Inc. v. American Honda Motor Co., Inc. There is a miscite. I believe the correct cite is 934 F.Supp. -- it is cited correctly. It is my error. 934 F.Supp. 596 (S.D.N.Y. 1996), affirmed 113 F.3d 329 (2d Cir. 1997).

In Judge Kaplan's case we were dealing with an Acura dealership in the Bronx. For a number of reasons, Honda, the manufacturer, wanted to terminate that dealership, feeling that the neighborhoods had changed, that there was not effective salesmanship going on and that, all in all, its overall state performance would be better if that Acura dealer was terminated. However, it didn't state that. It talked about other kinds of reasons that just weren't so, and Judge Kaplan

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1 found that they weren't so. Judge Kaplan expressly ruled that  
2 had Honda been candid in its reasons for termination, they  
3 might have been accepted.

4 And the Second Circuit specifically picked up and  
5 incorporated that same reservation. But because there was  
6 deception, the Second Circuit affirmed Judge Kaplan, and the  
7 termination was not permitted under the statute.

8 There is no deception in this case. That case is not  
9 a precedent, and there is no reason that that case should be  
10 considered an appropriate precedent for me to follow.

11 And there are a number of other cases that support the  
12 use of the standard, and let me mention those.

13 In Coady Corp. v. Toyota Motor Distribution, 361 F.3d  
14 50, (1st Cir. 2004), the Massachusetts Dealer Act use of the  
15 terms of "arbitrary" or "unfair" came into play. The dealer  
16 had argued that Toyota's method of distributing cars between  
17 dealers, based on self-reported sales, was arbitrary or unfair  
18 because it was known that the system was manipulated by various  
19 dealers who made false reports. And that was a dealer's  
20 argument. The First Circuit rejected the argument, holding  
21 that the Massachusetts Dealer Act does not warrant a  
22 substitution of judicial for business judgment. A distributor,  
23 acting honestly, is entitled to latitude in making commercial  
24 judgments. In this context, it is only the egregious decision  
25 that should be labeled arbitrary or unfair.

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1           In my opinion, the First Circuit got it right, and I  
2 find this to be a case that is soundly reasoned and therefore  
3 applicable to support General Motors' proposition in this case.

4           In Milos v. Ford Motor Company, 317 F.2d 712 (3d Cir.  
5 1963), a dealer argued that Ford had not acted in good faith in  
6 declining to renew a franchise based on the dealer's failure to  
7 meet sales targets. The Court rejected the argument, ruling  
8 that "Assignment of a market potential in the course of honest  
9 business judgment by a manufacturer to a dealer as a measure of  
10 expected performance within an area is not inherently unfair or  
11 arbitrary." I agree.

12          There is nothing in the case to indicate that a  
13 failure of a dealer to achieve an RSI of 100 will automatically  
14 lead to the termination of that dealer. General Motors takes  
15 steps to explain the deficiencies and to work with a dealer to  
16 obtain an improvement of performance, and that is another  
17 support of reasonableness.

18          I think I've covered all the other areas.

19          There is one other aspect in this case -- a few  
20 more -- that I want to deal with.

21          One of the grounds of reliance by Beck in bringing  
22 this action is Section 463(2)(c) of the New York Vehicle and  
23 Traffic Law, which deals with "conditioning the renewal or  
24 extension of a franchise on a franchised motor vehicle dealer's  
25 substantial renovation of the dealer's place of business unless

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1 the franchisor demonstrates the need for such change in the  
2 place of business," and so on. There has been no showing that  
3 that is applicable in the case, and that argument, having been  
4 abandoned, is dismissed as academic.

5 Accordingly, I deny Beck's petition for a declaratory  
6 judgment that the state measures used by General Motors are  
7 unfair, unreasonable or arbitrary. I deny the availability of  
8 injunctive relief, as well.

9 There is also under the law a request for attorney's  
10 fees. I don't think they are appropriate in this case, and I  
11 decline to order them.

12 I think that covers everything. Mr. McGrath, have I  
13 missed anything?

14 MR. McGRATH: I don't think you did, your Honor.

15 There was one issue I think the Court may have  
16 misspoke on. I just want to bring it to your attention. At  
17 one point you said that General Motors reduced the number of  
18 Chevrolet dealers from nine to five in the nine Downstate  
19 counties, and I think the record on that was that they reduced  
20 their number of dealers from nine to five in Westchester and  
21 the Bronx.

22 THE COURT: You are right, Mr. McGrath. I misspoke.

23 MR. McGRATH: I just wanted to bring it to your  
24 attention.

25 THE COURT: Thank you.

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1 (Pause)

2 I want to make one more comment, also.

3 Mr. McGrath has asserted a counterclaim on the part of  
4 General Motors, claiming that the only reason it gave up the  
5 Participation Agreement was on the basis of oral  
6 representations made by the principals of Beck. In light of my  
7 ruling, that counterclaim is academic and it is dismissed. It  
8 also violates the rule of Bridgestone/Firestone because it  
9 covers nothing more than the contract issues which are alleged  
10 as a breach of contract. So that counterclaim lacks merit and  
11 is academic, and I dismiss it. That makes for a final judgment  
12 here, allowing Mr. McRory to appeal, if he wishes to do so.

13 Mr. McRory, have I missed anything? I know you are  
14 disappointed by the ruling but --

15 MR. MCRORY: No, your Honor, in that aspect, no. You  
16 have missed nothing.

17 THE COURT: Thank you very much. Thank you for an  
18 excellent trial, both of you.

19 These findings and conclusions, ex temporeaneously  
20 issued, will constitute my findings and conclusions. A summary  
21 order will follow but it won't be more than a page. You now  
22 have finality in this case.

23 Thank you very much.

24 MR. MCGRATH: Thank you, your Honor.

25 - - -